

EXHIBIT 2

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Title 7 –AGRICULTURE

PART 1 – ADMINISTRATIVE REGULATION—Table of Contents

Subpart K—Appearance of USDA Employees as Witnesses in Judicial or Administrative Programs

Source: 55 FR 42347, Oct. 19, 1990, unless otherwise noted.

Sec. 1.210 Purpose.

This **subpart** sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA. These regulations do not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA. This **subpart** also does not apply to congressional requests or subpoenas for testimony or documents.

Sec. 1.211 Definitions.

(a) Administrative proceeding means any proceeding pending before any federal, state, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings, or the adjudication of any matter, dispute, or controversy.

(b) Appearance means testimony or production of documents the request for which arises out of an employee's official duties with USDA or relates to his or her employment with USDA. For

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the purpose of this **subpart**, an appearance also includes an affidavit, deposition, interrogatory, or other required written submission.

(c) Judicial proceeding means any case or controversy pending before any federal, state, or local court.

(d) Travel expenses means the amount of money paid to a witness for reimbursement for transportation, lodging, meals, and other miscellaneous expenses in connection with attendance at a judicial or administrative proceeding.

(e) USDA means the United States Department of Agriculture.

(f) USDA agency means an organizational unit of USDA whose head reports to an official within the Office of the Secretary of Agriculture.

(g) Valid summons, subpoena, or other compulsory process means an order that is served properly and within the legal authority and the jurisdictional boundaries of the court or administrative agency or official that has issued it.

(h) Witness fees means the amount of money paid to a witness as compensation for attendance at a judicial or administrative proceeding.

Sec. 1.212 General.

No USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with this **subpart**.

Sec. 1.213 Appearance as a witness on behalf of the United States.

An employee of USDA may appear as a witness on behalf of the United States in

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any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process. Employees should obtain permission for such an appearance from their immediate supervisor unless the USDA agency or General Counsel has issued instructions providing otherwise.

Sec. 1.214 Appearance as a witness on behalf of a party other than the United States where the United States is not a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear on behalf of a party other than the United States in a judicial, administrative proceeding in which the United States is not a party, shall promptly notify the head of his or her USDA agency of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her attendance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

(b) (1) An employee of USDA served with a valid summons, subpoena, or other compulsory process, or requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, may appear only if such appearance has been authorized by the head of his or her USDA agency, with the concurrence of the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

(2) An employee of USDA requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, without the service of a valid summons, subpoena, or other compulsory process, may appear only if such appearance has been authorized by the head of his or her USDA agency and approved by the appropriate Assistant Secretary, under Secretary or other general officer, and by the General Counsel, based upon a determination that such an appearance is in the interest of USDA.

(a) Unless an appearance is authorized as provided in paragraphs (b) (1) or (b) (2) of this section, the employee shall appear at the stated time and place (unless advised by the General Counsel or his or her designee that the summons, subpoena, or other process was not validly issued or served), produce a copy of these regulations and respectfully decline to provide any testimony. As appropriate, the General Counsel or his or her designee will request the assistance of The Department

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of Justice or of a United States Attorney, in the case of a judicial proceeding; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the Interests of the employee and USDA.

(b) If there is any question regarding the validity of a summons, Subpoena, or other compulsory process, an employee shall contact the Office of the General Counsel for advice.

(c) (1) In determining whether the employee's appearance is in the interest of USDA, authorizing officials should consider the following:

- (a) what interest of USDA would be promoted by the employee's testimony;
- (ii) whether an appearance would result in an unnecessary interference with the duties of the USDA employee;
- (iii) whether an employee's testimony would result in the appearance of improperly favoring one litigant over another.

(2) The considerations listed in paragraph (e) (1) of this section are illustrative and not exhaustive.

Sec. 1.215 Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a Party.

(a) Subpoenas duces tecum for USDA records in judicial or administrative

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proceedings in which the United States is not a party shall be deemed to be requests for records under the Freedom of information Act and shall be handled pursuant to the rules governing public disclosure under **subpart A** of this part.

(b) Whenever a subpoena duces tecum compelling the production of records is served on a USDA employee in a judicial or administrative proceeding in which the United States is not a party, the employee after consultation with the General Counsel or his or her designee, shall appear in response thereto, respectfully decline to produce the records on the grounds that it is prohibited by this section and state that the production of the records involved will be handled in accordance with **subpart A** of this part.

Sec. 1.216 Appearance as a witness or production of documents on behalf
Of a party other than the United States where the United
States is a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear or produce documents on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, shall promptly notify the head of his or her USDA agency and the General Counsel or his or her designee of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her appearance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.

(b) (1) Except as provided in paragraph (b) (2) of this section, an employee of USDA only may appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party if such appearance or production has been ordered by the service on the employee of a valid summons, subpoena, or other compulsory process issued by a court, administrative agency, or other official authorized to compel his or her appearance.

(2) An employee requested to appear as a witness or produce records on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is a party, without being served a valid summons, subpoena, or other compulsory process, may appear or produce records only if such appearance or production has been authorized by a representative of the Department of Justice, the United States Attorney, or other counsel who is representing the United States in the case of a judicial proceeding; or by the official or attorney representing the United States, in the case of an administrative proceeding.

(c) The head of the USDA agency shall consult with the General Counsel or his or her designee as to whether

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there are grounds to oppose the employee's attendance or production of documents, and, if so, whether to seek to quash the summons, subpoena, compulsory process, or to deny authorization under paragraph (b) (2) of this section.

(d) As appropriate, the General Counsel or his or her designee will request the assistance of the Department of Justice, a United States Attorney, or other counsel representing the United States, in the case of a judicial proceeding; or of the official or attorney representing the United States, in the case of an administrative proceeding, to represent the interest of the employee and USDA.

(e) If there is any question regarding the validity of a summons, subpoena, or other compulsory process, an employee shall contact the Office of General Counsel for advice.

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Sec. 1.217 Witness fees and travel expenses.

(a) Any employee of USDA who attends a judicial or administrative proceeding as a witness in order to testify or produce official documents on Behalf of the United States is entitled to travel expenses in connection with such appearance in accordance with the Agriculture Travel regulations.

(b) An employee of USDA who attends a judicial or administrative proceeding on behalf of the United States is not entitled to receive fees for such attendance.

(c) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is entitled to travel expenses in accordance with the Agriculture Travel Regulations to the extent that such expenses are not paid for by the court, agency, or official compelling his or her appearance or by the party on whose behalf he or she appears.

(d) An employee of USDA who attends a judicial or administrative proceeding on behalf of a party other than the United States when such appearance is in his or her official capacity or arises out of or relates to his or her employment with USDA is required to collect the authorized fees for such service and remit such fees to his or her USDA agency.

Sec. 1.218 Penalty.

An employee who testifies or produces records in a judicial or Administrative proceeding in violation of the provisions of this Regulation shall be subject to disciplinary action.

Sec. 1.219 Delegations.

(a) Except as provided in paragraphs (b), (c), or (d) of this section, the head of a USDA agency may delegate his or her responsibilities under this **subpart**, including the requirement to be notified of the receipt of a subpoena as provided in Secs. 1.214 (a) and 1.216 (a) of this part, to employees of his or her agency as follows:

(1) In the National office of the agency, to a level no lower than two levels below the agency head;

(2) In a field component of an agency, to a level no lower than the official who heads a state office.

(a) Notwithstanding paragraph (a) of this section, the Chief of the Forest Service may delegate his responsibilities under this **subpart** as follows:

(1) In the National office of the Forest Service, to a level no lower than a Deputy Chief of the Forest Service;

(2) In a field component of the Forest Service, to a level no lower than a Regional Forester or Station Director.

(a) Notwithstanding paragraph (a) of this section, the General Counsel may delegate his responsibilities under this **subpart** as follows:

(1) In the National office of the Office of the General Counsel, to a level no lower than an Assistant General Counsel;

(2) In the field component of the Office of the General Counsel, to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys who report to them.

(a) The responsibilities assigned to heads of agencies and to Assistant and Under Secretaries in Sec. 1.214 (b) (2) of this part may not be redelegated.

[58 FR 62495, Nov. 29, 1993; 58 FR 64353, Dec 6, 1993]

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